Privy Council Appeal No. 106 *of* 1922.

Hari Bakhsh - - - - - - - - *Appellant*

v.

Babu Lal and another - - - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1924.

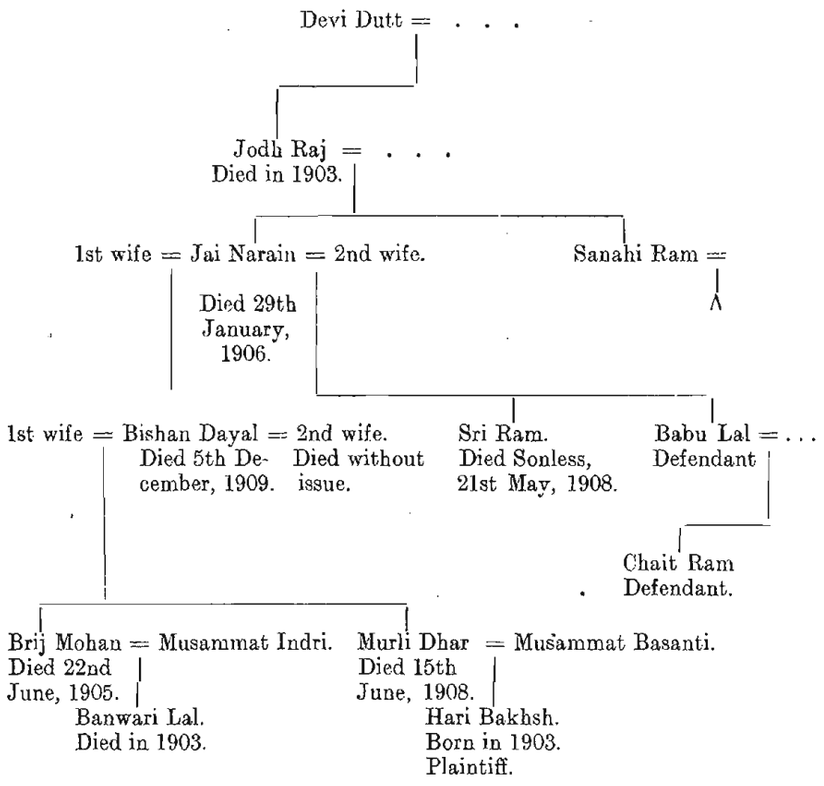
Present at the Hearing :

LORD DUNEDIN.
LORD SHAW.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the plaintiff from a decree, dated the 2nd July, 1917, of the Chief Court of the Punjab, which reversed a decree, dated the 15th May, 1914, of the District Judge of Delhi, and dismissed the suit. The suit is for the partition of property alleged by the plaintiff to be joint property of the parties.

The parties are Hindus of the Bakkal Aggarwall caste, and are subject to the law of the Mitakshara. The following pedigree shows how the parties are related to each other :—



Jai Narain and Bishan Dayal had daughters, to whom it is not necessary to refer.

The plaint in this suit, dated the 21st November, 1910, was presented to the Court of the District Judge of Delhi by Hari Bakhsh, a minor, by his guardian and next friend, Musammat Basanti, who is his mother. The defendants to the suit are Babu Lal and his son, Chait Ram.

The case of the plaintiff was that he and the defendants are the surviving male members of a joint Hindu family possessed of joint property, to a half-share of which he claimed to be entitled on partition, and he claimed to be entitled to a decree for partition and for accounts, and other reliefs. The District Judge of Delhi gave the plaintiff the decree which he claimed. The Chief Court of the Punjab, on the 2nd July, 1917, in appeal, dismissed the suit. On an application for review the Chief Court varied its decree dismissing the suit by granting the plaintiff a decree for partition of the Maliwara house and a declaration that the Katra Ashrafi house at Delhi is the property of the family, and that the plaintiff has equal rights in it with the defendant, Babu Lal. To the application for review the two defendants were respondents, and it does not appear why the declaration was not made against Chait Ram as well as against Babu Lal.

The case of the defendants was a denial that they and the plaintiff were members of a joint family, and a denial that the property which the plaintiff claimed to have partitioned was joint family property. Several defences were set up. The defendants

alleged that Bishan Dayal and his sons formed a separate joint family, and that they, after 1903, had separated from each other and had partitioned the property to which they were entitled; they further alleged that Sri Ram had adopted Chait Ram as his son. Their Lordships will at once deal with these allegations before proceeding to consider what was the main and substantial defence, if proved, to the suit, which was that in a separation and partition of 1903, in which Jai Narain and his branch had separated from Sanahi Ram and his branch, Jai Narain and his sons had between themselves separated, and he had partitioned between his son Bishan Dayal on the one side and his sons Sri Ram and Babu Lal on the other side the property which had fallen to him, Jai Narain, and his branch in the partition with Sanahi Lal.

The District Judge found that there was absolutely no proof of the alleged partition between Bishan Dayal and his sons after 1903. It was the fourth issue framed by the District Judge. It is not clear that that issue was discussed or considered in the appeal to the Chief Court, but in this appeal nothing was said to suggest that the finding of the District Judge on the fourth issue was wrong, and their Lordships consider that the finding of the District Judge may be accepted as conclusive that there was no separation or partition between Bishan Dayal and his sons after 1903 or at any time.

The object of alleging that Chait Ram had been adopted by Sri Ram is obvious. If that adoption had been proved the plaintiff could not in any event have been entitled on a partition to one-half of the property in question in this suit, or to more than one-third of it, and the defendants would between them have been entitled to two-thirds of it. The District Judge and the Chief Court concurred in finding that the alleged adoption was not proved. Such an adoption by a brother of the only son of his brother would be most unusual, and their Lordships accept that concurrent finding as correct.

The first common ancestor of the parties shown in the pedigree is Devi Dutt. He, with his son, Jodh Raj, carried on business as merchants at Basan, in the State of Jaipur. Jodh Raj removed from Basan to Delhi, and at Delhi he and his sons carried on business as cloth merchants. They had also branch shops at Calcutta and at Cawnpore. In 1903 the shops which belonged to the joint family, then consisting of Jodh Raj, his sons and grandsons, were known as: (1) Jodh Raj Narain, at Delhi; (2) Jai Narain Khemka, at Delhi; (3) Sri Ram-Ram Lal, in which a stranger was a partner, at Delhi; (4) Murli Dhar Deoki Namdam, in which strangers were partners, at Delhi; (5) Jodh Raj Sanahi Ram, at Calcutta; and (6) Jai Narain Sanahi Ram, at Cawnpore.

It is an admitted fact that at the time when Jodh Raj died, in 1903, Jodh Raj, his sons Jai Narain and Sanahi Ram, and their respective descendants constituted a joint Hindu family possessed of the joint property already mentioned. It is also an admitted

fact that in 1903, after Jodh Raj had died, Sanahi Ram and his son separated from Jai Narain and his descendants, and that on that separation the then joint property of the family at Delhi, Calcutta, and Cawnpore was partitioned between the two branches into which the joint family had separated, and that in that partition, which will hereafter be referred to as the partition of 1903, the shops (1), (2), and (3) above mentioned fell to Sanahi Ram and his branch, and the shops (4), (5), and (6) fell to Jai Narain and his branch.

The case of the defendants is that in the partition of 1903 Jai Narain and his sons also separated from each other and ceased to constitute a joint family. The District Judge held that the onus of proving that Jai Narain and his sons had separated from each other was upon the defendants, who alleged it. It has been argued on behalf of the defendants before their Lordships in this appeal that the onus of proving that Jai Narain and his sons had separated was not upon the defendants, and that it was for the plaintiff to prove that they had not separated. Their Lordships will presently express their opinion on that question, but they will first consider whether the evidence which was before the District Judge and the Chief Court proves or does not prove that Jai Narain and his sons separated, and for that purpose it is necessary to state some facts which have not so far been referred to by them.

Bishan Dayal lived in Cawnpore and had been in charge of and had managed the shop there. Bishan Dayal married twice, and after his second marriage he and his daughter-in-law, Musammat Basanti, had quarrelled, and he offered, through her brother, Rs. 30,000 as an inducement to her to hand over to him the custody of his grandson, Hari Bakhsh, the plaintiff. That offer was refused, and Bishan Dayal determined to oppose a claim which Musammat Basanti was making on behalf of her son, Hari Bakhsh, for the partition of the property now in question in this suit. On the 7th August, 1909, a suit was instituted in the Court of the Subordinate Judge of Cawnpore on behalf of Hari Bakhsh by his mother, Musammat Basanti, against Babu Lal, his son Chait Ram, and Bishan Dayal for the partition of the property now in question in this suit. Subsequently Musammat Basanti was added as a plaintiff in that suit, and Musammat Sarasuti, the widow of Sri Ram, and Musammat Indri, the widow of Brij Mohan, were added as defendants. The Additional Subordinate Judge of Cawnpore, before whom that suit was, on the 15th April, 1910, framed the issues for trial and ordered that the parties should file all their documents on that day. The Additional Subordinate Judge probably considered the evidence which the parties had brought before him, and having come to a conclusion that the Court of the Subordinate Judge had not jurisdiction to hear and determine that suit for partition, he, on the 29th August, 1910, returned the plaint to be presented in the proper Court. It is not now necessary for their Lordships to consider whether the Additional Subordinate Judge had or had

not jurisdiction to hear and determine that suit. They refer to it with an object which will presently appear.

As has been already mentioned, Bishan Dayal was a defendant to the suit for partition which was brought in the Court of Cawnpore on the 7th August, 1909. He made his will on the 26th November, 1909, and in it stated that in Sambat 1960, his step-brothers, Sri Ram and Babu Lal, had separated from him. In that suit of 1909 Bishan Dayal filed a written statement on the 30th November, 1909, in which he alleged that Jai Narain in the partition of 1903 had divided the property which had fallen to his share between him, Bishan Dayal, on the one side and Sri Ram and Babu Lal on the other side. Bishan Dayal died on the 5th December, 1909. On the part of the defendants, it has been contended in this appeal that the statements of Bishan Dayal in his will and written statement, above mentioned, are admissible in evidence in this suit as against the plaintiff, and prove that Sri Ram and Babu Lal had separated in 1903 from Bishan Dayal, that the family then ceased to be a joint family, and that the share of the joint family which fell to Jai Narain and his descendants in the partition of 1903 was partitioned between Bishan Dayal on the one side and Sri Ram and Babu Lal on the other. It appears to their Lordships that these statements of Babu Lal, who was then an interested party in the disputes and was then taking a position adverse to Hari Bakhsh, cannot be regarded as evidence in this suit and are inadmissible.

Excluding from consideration the statements of Bishan Dayal in his will and written statement, the only admissible evidence not open to objection and not ambiguous and inconclusive is, if genuine, a letter which purports to have been written by Bishan Dayal to his brother Babu Lal, dated " Phagan Sudi 2, Sambat 1965 (22nd February, 1909), which was for the first time produced by the defendant Babu Lal on the 14th October, 1911. That letter (Exhibit D. 14) as translated is as follows :—

" Compliments from Bishan Dial to Sri Ram-Babu Lal.

" Jai Narain in your presence separated us, the three brothers, on Asarh Badi 10, Sambat 1960. The whole work of Delhi remained with you, the two brothers, and the work at Cawnpore fell to my lot. This partition was effected by Jai Narain. We, the three brothers, agreed to his settlement and do not object to it. But the account of Sambat 1960 is not yet settled. Whatever is due under that account will be paid by you, the two brothers. I have nothing to do with it. The property situate at Basan and the houses in Delhi will remain joint. We of our own accord have written this. No one can object to it.

" Dated Phagan Sudi 2, Sambat 1965.

" What is written above is correct.

" (Sd.) BISHEN DIAL.
" (In Hindi characters.)

" Witnessed by—

" CHHOTE LAL, Khemka.
" In Hindi characters.)

" Witnessed by—
" GANGA RAM, Bhot.
" (In Hindi characters.)
" Witnessed by—
" SUNDER MAL, Khemka.
" (In Hindi characters.)
" Witnessed by—
" HARI RAM, Kanodia.
" (In Hindi characters.)
" Witnessed by—
" SHEO NARAIN.
" (In Hindi characters.) "

Their Lordships are informed by counsel engaged in this appeal that Asarh Badi 10, Sambat 1960, was the 20th June, 1903.

The only witness at the trial who said that the letter was in the writing of Bishan Dayal was the defendant, Babu Lal. The only witnesses of the five to the letter who spoke to it at the trial were Chota Lal, Hari Ram and Sheo Narain, and not one of them said that it was written or executed in his presence. Sheo Narain in his evidence at the trial said that Bishan Dayal told him that it was a farkhati—that is, a release. At the trial before the District Judge Babu Lal said as to it (Exhibit D. 14) :—

> " The release to which (I) certified yesterday was with me. I have given (I gave it) it to my Pleader, Anand Sarup, for production (at the trial at Cawnpore). They said they would produce it when necessary. I cannot say if they produced it or not. After the close of the case I got back the release from my pleader."

Anand Sarup was the defendants' pleader at the hearing of the suit before the Additional Subordinate Judge at Cawnpore. Exhibit D. 14 was, if a genuine letter, one which should have been filed on behalf of the defendants in the Court of the Subordinate Judge of Cawnpore on the 15th April, 1910, in obedience to his order of that date. It was, if genuine, a most important document —in fact, the most important document for their case. It never was filed or produced at the trial before the Additional Subordinate Judge. If it was in the possession of Anand Sarup at any time, he should have been called as a witness at the trial before the District Judge of Delhi to speak to the fact and to explain why it was not filed or produced in the Court of the Additional Subordinate Judge. He was not called as a witness before the District Judge of Delhi and no explanation of his absence was offered. The District Judge found, as a fact, that Exhibit D. 14 was a forgery. The Chief Court, on the contrary, held that Exhibit D. 14 was a genuine document executed by Bishan Dayal. Their Lordships, after a careful consideration, find that Exhibit D. 14 is not a genuine document, and was manufactured for the purpose of being used in evidence at the trial before the District Judge of Delhi.

Excluding Exhibit D. 14 and the statements in the will and written statement of Bishan Dayal, which have been already mentioned, from evidence which can be considered in this suit,

there is no documentary evidence which proves either that Bishan Dayal and his brothers, Sri Ram and Babu Lal, had or had not separated. The learned and able counsel engaged in this appeal have been compelled to admit that fact, and that all the other evidence in the suit is as consistent with the brothers never having separated as with the brothers having separated. The District Judge found that the brothers had not separated ; the Chief Court, which treated Exhibit D. 14 as evidence, found that they had separated. Their Lordships agree with the District Judge that it is not proved that the brothers ever did separate.

It remains to be considered whether on the separation and partition between Jai Narain and his brother, Sanahi Ram, in 1903, it is to be presumed, unless the contrary is proved by the plaintiff, that Jai Narain and his sons, Bishan Dayal, Sri Ram and Babu Lal, and Jai Narain's grandsons, Brij. Mohan and Murli Dhar, all of whom had then been born and were then living, ceased to be amongst themselves members of a Hindu joint family consisting of Jai Narain and his descendants then living. It must be remembered that they were Hindus governed by the law of the Mitakshara, and that each of them had on his birth become a co-parcener in any ancestral property which had come to Jai Narain. The share which Jai Narain took as the share of him and his branch on his separation from his brother, Sanahi Ram, was ancestral property.

It has been contended in this case on behalf of the defendants that the effect of the separation and partition between Jai Narain and his brother, Sanahi Ram, in 1903, after the death of their father, Jodh Raj, was to cause, by implication of law, a separation between Jai Narain and his descendants and to make them cease to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family, and it was contended on behalf of the defendants that that proposition is to be inferred from the decisions of the Board in *Balabux Ladhuram* v. *Rukhmabai*, L.R. 30, I.A. 130, *Balkishen Das* v. *Ram Narain Sahu*, L.R. 30, I.A. 139, and *Jatti* v. *Banwari Lal*, L.R. 50, I.A. 192. It appears to their Lordships that the proposition contended for is a proposition which cannot reasonably be inferred from the decisions of the Board or any of them which have been cited. To understand and apply a decision of the Board or of any Court it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided. In *Bahabux Ladhuram* v. *Rukhmabai* it appears that three Hindu brothers, Girdhari Lahl, Kunyaram and Ladhuram, owned a shop which had been founded by their father, and that in 1869 or 1870 Kunyaram separated from his brothers, took out his share, amounting to about Rs. 11,000, and started a shop of his own. In that case Lord Davey, in delivering the judgment of the Board, said :—

> "It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united. . . . Their Lordships think that an agreement amongst the remaining

members of a joint family to remain united or to re-unite must be proved like any other fact."

The remaining members of the joint family in that case were the brothers, Girdhari Lahl and Ladhuram. The Board was not considering, and had not to consider, whether, if Girdhari Lahl, for example, had sons living when Kunyaram separated from his brothers, Girdhari Lahl and his sons would cease to be as between themselves a joint family. That was not the case and did not arise in the case before the Board.

In *Balkishen Das* v. *Ram Narain Sahu* the four members of a Hindu joint family, who were cousins, entered into an ikrarnama which stated that defined shares in the whole estate of the joint family had been allotted to the several co-parceners. It was there held that the agreement defining the shares effected a separation in estate, and that evidence of some of the co-parceners having continued to enjoy their shares in common would not affect their tenure of their property or their interest in it.

In *Jatti* v. *Banwari Lal* four Hindu brothers who were living as a joint Hindu family executed a deed by which the assets of the family were described and divided between them, and one of the four brothers, Ishar Das, was finally paid out, and thereafter the business was carried on by the three remaining brothers, to whose separate accounts the profits of the business were carried in equal shares. In that case Lord Dunedin in delivering the judgment of the Board, after quoting the passage above set out from Lord Davey's judgment, approved of and adopted the statement of the trial Judge in the suit, who said :—

> "There is absolutely no material on the file from which it can be inferred that the three brothers continued united or reunited as co-parcenary members of a joint Hindu family, while defendant's own books show the contrary. . . . I have therefore not the least hesitation in finding that on the separation of Ishar Das the family of the parties ceased to be a joint Hindu family in the strictest sense of the term ; or, in other words, its members ceased to be co-parceners."

The members ceased to be co-parceners of each other, but it is not suggested that if one of those members happened to have had sons who were his co-parceners when Ishar Das separated from his brothers, such sons and their father would cease to be co-parceners constituting together a joint and undivided family.

If their Lordships were to hold in this case that it is to be presumed in law that the separation and partition effected in 1903 by Jai Narain and his brother, Sanahi Ram, involved necessarily a separation between Jai Narain and his sons, their Lordships would, it appears to them, be introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara, for which no authority has been brought to the attention of their Lordships.

In conclusion, their Lordships find that Jai Narain and his sons did not separate, that no separation between Bishan Dayal and his brothers, Sri Ram and Babu Lal, or between any of them, has been proved, and they will humbly advise His Majesty that

the decree of the Chief Court of the Punjab should be set aside, and the decree of the District Judge of Delhi of the 15th May, 1914, should be restored and affirmed. The defendants (respondents) must pay the costs of this appeal and of the appeal to the Chief Court.

In the Privy Council.

HARI BAKHSH

v.

BABU LAL AND ANOTHER.

DELIVERED BY SIR JOHN EDGE.

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